In the Supreme Court of the United States

OCTOBER TERM, A.D. 1972

No. 72-1455

RAYMOND K. PROCUNIER,
DIRECTOR CALIFORNIA DEPARTMENT OF CORRECTIONS ET AL.,
APPELLANTS,

v.

ROBERT MARTINEZ ET AL.,
APPELLEES.

BRIEF OF THE CENTER FOR CRIMINAL JUSTICE, BOSTON UNIVERSITY SCHOOL OF LAW AMICUS CURIAE

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Interest of Amicus Curiae *

The Center for Criminal Justice is a university-based study center which undertakes extensive research involving both legal scholarship and empirical investigation in selected areas of the criminal justice field. The Center has devoted a substantial amount of time to the two major substantive issues raised by this appeal.

* Letters of consent from counsel for appellants and counsel for appellees have been filed with the clerk of the Court.

In a comprehensive evaluation of the rights and responsibilities of prisoners, which resulted in the promulgation of Model Rules and Regulations † that have been adopted as the basis for recommended changes in the Department of Corrections of the Commonwealth of Massachusetts, the Center dealt with the issue of constraints on prisoners' mail. A separate study was also done concerning the need for law student involvement in prison legal services.††

In each of these areas, the Center's eventual proposals were based on the results of legal analysis and on a close involvement with prison authorities and the problems they encounter. The Center maintains an ongoing interest in this field and sets forth in this brief its views on the legal questions concerning the prison regulations at issue before the Court.

Argument

I.

THE DISTRICT COURT PROPERLY INVALIDATED THE CHALLENGED REGULATIONS UNDER THE COMPELLING STATE INTEREST TEST AND UNDER THE REASONABLE AND NECESSARY TEST, GIVEN CONTENT BY A LESS RESTRICTIVE ALTERNATIVE.

The right to use the mails [1] and the right of access to the

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† Center for Criminal Justice, Boston University School of Law, *Model Rules and Regulations on Prisoners' Rights and Responsibilities* (West, 1973).

†† Center for Criminal Justice, Boston University School of Law, *Perspectives on Prison Legal Services: Needs, Impact, and the Potential for Law School Involvement* (U. S. Dept. of Commerce, National Technical Information Service, 1971). Copies of both documents have been lodged with the librarian for the Court.

[1] "The United States may give up the Post Office when it sees fit, but while it carries it on, the use of the mail is almost as much a

courts[2] are fundamental personal freedoms jealously guarded by the courts. It is well established that such freedoms come before the Court occupying a "preferred position" and that regulations restricting these rights must bear a heavy burden of justification.

These two fundamental rights are not discarded at the prison gates.[3] The fact of incarceration may add factors to be considered in the weighing process, but officials who wish to justify restrictions on such rights must continue to bear the same heavy burden.[4] In striking down the mail regulations, the District Court measured the weight of this burden with two alternative standards: the "compelling state interest" test and the "reasonable and necessary" test. It was unnecessary for the Court to decide which

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part of free speech as the right to use our tongues . . ." *United States ex rel. Milwaukee Social Democratic Pub. Co.* v. *Burleson*, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting), *quoted in Blount* v. *Rizzi*, 400 U.S. 410, 416 (1971).

[2] [A]bsent a countervailing state interest of overriding significance, persons forced to settle their claims of rights and duty through the judicial process must be given meaningful opportunity to be heard." *Boddie* v. *Connecticut*, 401 U.S. 371, 377 (1971).

[3] *Nolan* v. *Fitzpatrick*, 451 F. 2d 545, 547 (1st Cir. 1971); *Levier* v. *Woodson*, 443 F. 2d 360 (10th Cir. 1971); *Brown* v. *Peyton*, 437 F. 2d 1228, 1230 (4th Cir. 1971); *Walker* v. *Blackwell*, 411 F. 2d 23, 24 (5th Cir. 1969); *Payne* v. *Whitmore*, 325 F. Supp. 1191, 1193 (N.D. Cal. 1971); *Fortune Society* v. *McGinnis*, 319 F. Supp. 901, 903 (S.D. N.Y. 1970) (freedom of expression). *Goodwin* v. *Oswald*, 462 F. 2d 1237, 1241 (2d Cir. 1972); *Coleman* v. *Peyton*, 362 F. 2d 905, 907 (4th Cir.) *cert. denied*, 385 U.S. 905 (1966); *Smith* v. *Robbins*, 328 F. Supp. 162, 164 (D. Me. 1971) *aff'd* 454 F. 2d 696 (1st Cir. 1972) (access to courts).

[4] Because certain personal freedoms (such as the right of access to the courts and the right to communicate) are equally crucial to the inmate and because constitutional rights are often more vulnerable in a prison context, the fact of incarceration should heighten and not lessen judicial scrutiny.

formulation was appropriate because the regulations failed to comply with either test. *Martinez* v. *Procunier*, 354 F. Supp. 1092, 1096 (N.D. Cal. 1973). Further, the District Court found that, in reviewing restrictions on access to the courts, it must ascertain whether there existed "reasonable alternative means of limiting the undesirable conduct which do not entail so significant a restriction on access to the courts." 354 F. Supp. at 1098.

It is submitted that, in dealing with both these fundamental rights, the appropriate question to ask is whether a "compelling state interest" is served.[5] At the least, as the District Court indicated, the regulations should fall if there is a less restrictive alternative regardless whether the "compelling state interest" test or the "reasonable and necessary" test is used. Consequently, employment of stringent standards are urged when restrictions on fundamental rights are being considered. Such an abundance of caution is necessary in the prison context where these rights are so open to invasion.

II.

Rule MV-IV-02 Impermissibly Impinges upon Prisoners' Constitutional Right of Access to the Courts.

Standards

The Court has recognized that prisoners' constitutional right of access to the courts, *White* v. *Ragen*, 324 U.S. 760 (1945); *Ex parte Hull*, 312 U.S. 546 (1941), is hollow without the means to enable such access. *Johnson* v. *Avery*, 393 U.S. 483 (1969); *Younger* v. *Gilmore*, 414 U.S. 15

[5] *Fortune Society* v. *McGinnis*, 319 F. Supp. 901, 904 (S.D. N.Y. 1970); *Palmigiano* v. *Travisono*, 317 F. Supp. 776, 785 (D. R.I. 1970) (right to use of the mails); *Goodwin* v. *Oswald*, 462 F. 2d 1237, 1244 (2d Cir. 1972) (access to the courts).

(1971). In *Cruz* v. *Hauck*, 475 F. 2d 475, 476 (5th Cir. 1973), Chief Judge John R. Brown underlined the importance of this right: "It is clear that ready access to the courts is one of, perhaps *the*, fundamental constitutional right." This right "encompasses all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him." *Gilmore* v. *Lynch*, 319 F. Supp. 105, 110 (N.D. Cal. 1970), *aff'd sub nom. Younger* v. *Gilmore*, 414 U.S. 15 (1971). Furthermore, ". . . the constitutional protection . . . includes access to all courts, both state and federal without regard to the type of petition or relief sought." *Hooks* v. *Wainwright*, 352 F. Supp. 163, 167 (M.D. Fla. 1972).

In the present case, the issue is implementation of the fundamental constitutional right of prisoners' access to the courts. Inherent in its implementation is the right either to retain counsel or to receive the assistance of counsel if the circumstances so require. *See Younger* v. *Gilmore*, 414 U.S. 15 (1971); *Douglas* v. *California*, 372 U.S. 353 (1963); *Hooks* v. *Wainwright*, 352 F. Supp. 163 (M.D. Fla. 1972). Both aspects of this fundamental right invoke an affirmative duty on the state to provide inmates with effective means of access to the courts, *Hooks* v. *Wainwright*, 352 F. Supp. 163 (M.D. Fla. 1972), of which "a necessary concommitant to the right of access is the assistance of counsel." *Goodwin* v. *Oswald*, 462 F. 2d 1237, 1241 (2d Cir. 1972).

Assistance of counsel means effective assistance. *McMann* v. *Richardson*, 397 U.S. 759, 771 and n. 14 (1970); *Powell* v. *Alabama*, 287 U.S. 45, 71 (1932). To be effective, an attorney must know both the facts and the law involved in his case. *People* v. *Brown*, 102 Cal. Rptr. 518, 26 Cal. App. 3d 825 (1972); *People* v. *Gayton*, 88 Cal. Rptr. 891,

10 Cal. App. 3d 178 (1970). In order to do this, he needs to remain in contact with his client. *Coles* v. *Peyton,* 389 F. 2d 224 (4th Cir. 1968); *see* ABA *Standards Relating to the Defense Function* § 3.2, Commentary (Approved Draft 1971). As noted by the District Court below, investigation often is crucial for determination of the facts and requires client contact. 354 F. Supp. at 1097. Unless the facts are developed fully, legal analysis may prove fruitless. Any prison rule which limits counsel's ability to provide effective assistance through appropriate investigation and regular contact with the client seriously risks denying client prisoners their right of access to the courts.

The District Court determined as fact that, when attorneys are not allowed to send law students and paraprofessionals into prisons to interview inmates, the attorney's time available for legal evaluation is sacrificed in the interest of travel to interview inmates personally and, further, that under these circumstances, fewer prisoners can be served by attorneys. *Id.* at 1097-1098 (1973). When such facts exist, counsel's effectiveness and prisoners' fundamental right of access to the courts are eroded. When the ability of lawyers to provide assistance to prisoners at minimal cost is curtailed by prison rules like MV-IV-02,[6] prisoners in need of legal counsel may have to rely on jailhouse lawyers, an alternative recognized at best as a necessary evil if no other form of legal assistance is available.[7]

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[6] Director's Mail and Visiting Manual, Section MV-IV-02 states:

> Investigators for an attorney-of-record will be confined to not more than two. Such investigators must be licensed by the State or must be members of the State Bar. Designation must be made in writing by the attorney.

[7] *See Johnson* v. *Avery,* 393 U.S. 483, 488 (1969); *U.S.* v. *Simpson,* 436 F. 2d 162, 166-167 (D.C. Cir. 1970); Center for Criminal Justice, Boston University School of Law, *Perspectives on Prison*

The District Court found that Rule MV-IV-02 was overbroad, 354 F. Supp. at 1099, and that the rule could not be justified merely by a perceived "threat to security" from a few attorney-designated investigators whom prison officials viewed as "people that we chose not to have in our institutions." *Id.* (Quoting Procunier Deposition 24-25). There is no indication that law students as a class or that paraprofessionals as a class are a security threat. By balancing considerations of prisoners' fundamental right of access to the courts against the questionable justifications for Rule MV-IV-02, it is clear that the rule is constitutionally insufficient under the reasonable and necessary test ("the *extent* of restriction against the *need* for restriction"), particularly as given content by a less restrictive alternative ("the existence of reasonable alternative means"). *Id.* at 1098. Rather than creating "a new constitutional right in the inmate," Brief for Appellant at 27, the District Court's ruling does no more than implement the principles of *Johnson* v. *Avery,* 393 U.S. 483 (1969), and *Younger* v. *Gilmore,* 414 U.S. 15 (1972), by removing an unconstitutional barrier to prisoner access to the courts.

Therefore, in attempting to reverse the holding of the District Court that Rule MV-IV-02 is unconstitutional, the State carries the heavy burden accompanying any denial of a fundamental right. Rule MV-IV-02 is one of those "... rules [that] touch upon interests of which the judiciary is more solicitous, and the burden of justifying these regulations is especially heavy, comparable to the 'overwhelm-

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Legal Services: Needs, Impact, and the Potential for Law School Involvement xxiv (1971) [hereinafter cited as *Prison Legal Services*]: "prison legal services may be instrumental in . . . reducing the inmate's dependence on services which may only be available through representatives of the inmate power structure (*e.g.*, the "jailhouse lawyer")"; Jacob and Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process,* 18 Kan. L. Rev. 493 (1970).

ing state interest' required by *Shapiro* v. *Thompson.*" *Gilmore* v. *Lynch,* 319 F. Supp. 105, 109 (N.D. Cal. 1970), *aff'd sub nom. Younger* v. *Gilmore,* 414 U.S. 15 (1971).

Implementation of Access

The resources of the bar, which include lay assistants as well as attorneys, already are strained at least in the provision of legal services to the poor, of which prisoners are one important category.[8] Informed observers estimate that between 60 and 90 percent of prisoners are financially unable to retain counsel.[9] When lawyers are denied the right to enlist in a responsible manner the assistance of non-attorneys, specifically law students and paraprofessionals, the amount of time a lawyer must spend on a case increases substantially; the number of cases he can handle decreases; and the quality of his preparation, particularly in the area of investigation, may be hampered by the need to conserve time and resources.[10] The difficulties facing attorneys obviously work to the detriment of prisoners, both those the attorneys represent and those the attorneys would like to represent but cannot because their lay resources are immobilized by Rule MV-IV-02.

In *Argersinger* v. *Hamlin,* 407 U.S. 25 (1972), the manpower-cost dilemma involved in implementing the Sixth Amendment's right to the assistance of counsel led some members of the Court to speculate on the possible use of

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[8] *See Johnson* v. *Avery,* 353 U.S. 483, 491 (Douglas, J., concurring) (1969).

[9] Jacob and Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process,* 18 Kan. L. Rev. 495, 509-510, n. 105 and n. 107 (1970).

[10] *Cf.* American Bar Association, *Code of Professional Responsibility,* Ethical Consideration 3-6 (1971).

nonlawyers as counsel.[11] Similar concerns face the Court today, although in a context of assistance to attorneys who wish to help prisoners gain access to the courts. As in *Argersinger*, "the heart of the problem [facing prisoners] . . . is the distribution and availability of lawyers,"[12] especially since most prisons are located in areas requiring substantial travel by attorneys. *Martinez* v. *Procunier*, 354 F. Supp. at 1098.

Law students offer an engaged and informed source of assistance to prisoners and to attorneys[13] representing prisoners. While direct student access to prisons in the context of law school clinical programs[14] is permitted by

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[11] 407 U.S. 25, 40 (1972) (Brennan, Douglas, and Stewart, JJ., concurring). MR. JUSTICE BRENNAN noted that nationally there are 57 law school clinical programs in corrections. *But see id.* at 44 (Powell and Rehnquist, JJ., concurring in the result). MR. JUSTICE POWELL questioned whether the lay professionals suggested by the Solicitor General qualify as counsel.

[12] *Id.* at 58 (Powell and Rehnquist, JJ., concurring in the result).

[13] American Bar Association, *Code of Professional Responsibility*, Canon 3, Ethical Consideration 3-3, n. 3 (1971):

> A lawyer cannot delegate his professional responsibility to a law student employed in his office. He may avail himself of the assistance of the student in many of the fields of the lawyer's work, such as examination of case law, finding and *interviewing witnesses*, making collections of claims, examining court records, *delivering papers, conveying important messages*, and other similar matters. But the student is not permitted, until he is admitted to the Bar, to perform the professional functions of a lawyer such as conducting court trials, giving professional advice to clients or drawing legal documents for them . . . . *ABA Opinion* 85 (1932) (emphasis added).

[14] *Martinez* v. *Procunier*, 354 F. Supp. 1092 (1973). Law school clinics in prisons labor under a number of serious constraints arising primarily from the conflict between educational purpose and service goals. *Prison Legal Services* at xxxii:

the California Department of Corrections, the very same class of persons (students) is barred from access when working for a private attorney rather than for a clinical program. In both situations, the good conduct of the students should be presumed from their implied interest in future admission to the Bar and from their knowledge of the Bar's clear interest in indicia of ethical sensibilities. Moreover, where a student is employed by a private attorney, the student's good conduct is ensured by the recognized agency relationship that exists between the two.[15]

Paraprofessionals as a class are also a significant and growing source of assistance to lawyers.[16] Like law

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In attempting to implement a student-staffed, onsite comprehensive service program of prison legal aid, various inherent limitations were exposed which may have general application to future law school efforts in this area. Caseload volume, law student inexperience and constraints on available time, continuity of student involvement and program operation, and the conflicting demands of education and service cast doubts on the ability of a law school to shoulder the full burden of such a project. Resulting operational limitations included: (1) the inability to conduct complete investigations wherever warranted (*e.g.*, verifying allegations of fact and reviewing trial records for error); (2) the inability to conduct extensive legal research as might be required in collateral attacks, appeals and test case litigation; (3) the inability to engage in trial work requiring heavy preparation; and, (4) the inability to process many cases which, of necessity, were likely to be long term in their duration.

[15] American Bar Association, *Code of Professional Responsibility*, Canon 3, Ethical Consideration 3-3, n. 3 (1971):

> The student in all his work must act as *agent* for the lawyer employing him, who must supervise his work and be responsible for his good conduct. (emphasis added).

[16] *See* Avila, *Legal Paraprofessionals and Unauthorized Practice*, 8 Harv. Civ. R. — Civ. Lib. L. Rev. 104 (1973); Brickman, *Expansion of the Lawyering Process through a New Delivery System: The Emergence and State of Legal Paraprofessionals*, 71 Colum. L. Rev. 1153 (1971).

students, they may engage in a broad range of activities.[17] Unlike most law students, however, a paraprofessional usually is a full-time employee. This relationship naturally involves careful scrutiny by the attorney and includes a recognized obligation of confidentiality.[18] Scrutiny and confidentiality serve as restraints on misconduct similar to the law student's expectation of joining the Bar and the student-attorney agency relationship.

Although licensed investigators [19] may be a source of lay assistance to attorneys providing counsel to prisoners, their availability for this purpose is questionable, both in terms of location and cost. There are approximately 2300 active investigator licenses in California.[20] Of those persons—individuals or group businesses—holding licenses, only some 900 licensees are actively engaged in investiga-

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[17] American Bar Association, *Code of Professional Responsibility*, Canon 3, Ethical Consideration 3-6, n. 3 (1971):

> A lawyer may employ lay secretaries, *lay investigators*, lay detectives, lay researchers, accountants, lay scriveners, nonlawyer draftsmen or nonlawyer researchers. In fact, he may employ nonlawyers to do any task for him except counsel clients about law matters, engage directly in the practice of law, appear in court or appear in formal proceedings a part of the judicial process [sic], so long as it is he who takes the work and vouches for it to the client and becomes responsible to the client. *ABA Opinion* 316 (1967) (emphasis added).

[18] *Id.* at Canon 4, Ethical Consideration 4-2.

[19] Private Investigator and Adjustor Act; Cal. Business and Professions Code, Chapter 11; West's Ann. Bus. and Prof. Code § 7500-7590.

[20] Telephone conversation with Ronald Allen, 1915 Beverly Boulevard, Los Angeles, California 90057, (213) 483-2216, former President of the California Association of Licensed Investigators (until July 1973), Member of the Board of Directors of the California Association. September 11, 1973.

tion work.[21] Between 25 and 30 percent of the 900 active licensees are located in the metropolitan Los Angeles area. Rates vary according to the skill and experience of the investigator. A common rate is around $12.50 per hour, with a few top investigators[22] receiving between $20 and $30 per hour.[23] While criminal investigation is one focus in the occupation, "the majority work in the civil and business field because they're the ones who can pay the tab."[24] Thus, restricting access to prisons only to members of the Bar and to licensed investigators effectively precludes attorneys who are representing prisoner clients from being able to rely on someone else to interview their clients. This result has the necessary effect of impermissibly restricting access to the courts.

Assistance from legal counsel in obtaining access to courts has been found to reduce frivolous claims,[25] to allow valid claims to be presented more effectively,[26] and to

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[21] *Id.* These figures do not include persons working as guards. The active licensees employ some 3000 assistants. The large number of active licenses not being used is due to the licensee's interest in maintaining the possibility of future activity and avoiding the annoyance of reviving a lapsed license.

[22] *Id.* There are around 25 licensed investigators who can obtain top fees.

[23] *Id.* In addition to the hourly wage, an employer must pay for such necessary expenses as lodging, photo copying, supplies, and air travel. Automobile travel is additional and is computed at between 20 and 25 cents per mile.

[24] *Id.* Licensed investigators have no independent status to permit them entry into a prison.

[25] *Prison Legal Services* at I-7-8, II-55-61.

[26] Jacob and Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process*, 18 Kan. L. Rev. 493, 521 (1970): "It is the view of the writers, based in part upon the experience of the Emory project, that if competent attorney assistance were provided to every indigent inmate desiring to file a post-conviction petition, the success rate would be at least

reduce inmate hostility toward judges, prosecutors, defense lawyers, and police.[27] Even when a prisoner does not prevail in a case, it often is of great psychological importance to him that he had effective access to the courts.[28]

Since Rule MV-IV-02 improperly impinges upon the fundamental right of access to courts, its invalidation by the District Court should be sustained.

III.

Current Correctional Trends Show that Appellant's Mail Regulations do Not Represent the Least Restrictive Alternative Nor do they Promote a Compelling State Interest.

The District Court disapproved the prison mail regulations because they infringed upon the inmates' substantive and procedural First Amendment rights. In terms of substantive rights, the District Court found that the regulations in question were "vague and overbroad" and "permit[ted] censoring of lawful expressions without any apparent justification." 354 F. Supp. at 1096-1097. In addition, the challenged rules failed to meet First Amendment procedural requirements. 354 F. Supp. at 1097. Like substantive rules, inadequate procedures "chill" the right of free expression.[29] In order to assure the "necessary sensi-

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ten per cent and, perhaps as high as fifteen per cent or more of petitions filed." Notice, for comparison, that sixteen per cent of direct criminal appeals in federal cases succeeded in 1960. *Id.* at n. 165.

[27] *Prison Legal Services* at xxiv-xxv, II-68-77, IV-58-60.

[28] *Id.* at xxix.

[29] Procedural guarantees "assume an importance fully as great as the validity of the substantive rule of law to be applied." *Speiser* v. *Randall*, 357 U.S. 513, 520 (1958). Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518 (1970).

tivity to freedom of expression,"[30] the District Court ordered that mail regulations should provide for notice of disapproval, reasonable opportunity to contest the decision, and review of the decision by an individual other than the one who originally disapproved. 354 F. Supp. at 1097.

Current Practices

A survey[31] of mail regulations presently in use in other jurisdictions demonstrates the difficulty in justifying the mail regulations in question.

California inmates' mail was censored by prison officials whose discretion was ungoverned by effective standards. *See*, 354 F. Supp. at 1095. In contrast, regulations in several states severely restrict institutions' handling of incoming mail, outgoing mail, and official mail.[32]

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[30] *Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965).

[31] The following survey of regulations is based on data obtained in September, 1973, by the Center for Criminal Justice from corrections departments of twelve jurisdictions. They are Alaska, Connecticut, Kansas, Massachusetts, Minnesota, Ohio, Pennsylvania, Rhode Island, South Carolina, Washington, Wisconsin, and the federal government. (Of the twelve jurisdictions, two provided information too limited to present a clear indication of their current policies.) This selection was made on the basis of an extensive 1971 study by the Center of rules employed by the corrections departments of all the states. Those departments selected had recently changed their rules or were in the midst of change. No attempt was made to perform a comprehensive national survey. Nor will there be any attempt to present the total results of the September survey. The findings are offered simply to show that liberalized mail procedures are actually practiced and pose no threat to valid institutional objectives. All letters, regulations, and notes of interviews obtained from the responding departments are on file at the Center.

[32] Regulations of corrections departments of other states also provide convincing evidence, substantive rights aside, that deprivation of procedural guarantees is not necessary to advancement of any

(a) Outgoing Mail

Massachusetts, Ohio, Rhode Island, and Washington all permit outgoing mail to be sent in sealed envelopes, immune from inspection of its physical contents and free of censorship of its verbal content.[33] South Carolina and Wisconsin neither censor nor inspect outgoing mail to addressees who

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state ends. Five of the states surveyed require notice to the inmate of disapproval and return of mail. Telephone interview with Charles G. Adams, Director of the Alaska Division of Corrections, September 13, 1973 [hereinafter cited as *Adams Interview*]; Commissioner's Bulletin, 71-4, June 21, 1971 (Massachusetts); telephone interview with William K. Weisenberg, Administrative Assistant to the Director, September 14, 1973 [hereinafter cited as *Weisenberg Interview*] (Ohio); South Carolina Department of Corrections, *Inmate Guide* 19 (1972); Wisconsin Division of Corrections, *Manual of Adult Institution Procedures* 23 (1973) [hereinafter cited as *Wisconsin Manual*]. Washington goes so far as to notify the inmate of the removal of contraband from mail and of the opening of outgoing mail where probable cause to inspect has been found to exist. Administrative Order No. 838, 3, July 26, 1973. Alaska, Massachusetts, Ohio, and South Carolina provide the opportunity to contest a decision. *Adams Interview* (Alaska); telephone interview with Robert A. Bell, September 14, 1973 [hereinafter cited as *Bell Interview*] (Massachusetts); *Weisenberg Interview* (Ohio); *Inmate Guide* at 19 (South Carolina). Some states limit the sanctions available for violation of mail rules. While California inmates could be confined in segregation for improper correspondence, Pennsylvania and South Carolina guarantee correspondence "privileges" except in the event of "serious violations" (Administrative Directive, Resident Mail Privileges 3, September 1, 1972 [hereinafter as *Pennsylvania Directive*]) and when the inmate is "confined in punitive segregation" (*Inmate Guide* at 19). Alaska may impose no more than a return to censorship (*Adams Interview*).

[33] Commissioner's Bulletin 71-4, June 21, 1971 (Massachusetts); Department of Rehabilitation and Correction Administrative Regulations 814(a) [hereinafter cited as *Ohio Regulation*]; Regulation Governing Mail for Inmates at the Adult Correctional Institutions (Rhode Island); Administrative Order Number 838, 2-3, July 26, 1973 (Washington).

appear on an approved list of correspondents.[34] Alaska and Pennsylvania inspect outgoing mail but do not read it.[35] Kansas has discontinued "routine inspection" of outgoing mail except "where the security of the institution is believed to be involved."[36]

(b) Incoming Mail

Alaska, Ohio, Pennsylvania, Rhode Island, South Carolina, Washington, and Wisconsin merely inspect incoming mail for contraband.[37]

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[34] The South Carolina Department of Corrections has three categories of correspondents. The "unrestricted" list includes attorneys, courts, state and federal officials, ministers, religious organizations and public service organizations. The "approved" list includes those who are judged not to represent a threat to security of the institution. Mail to these two types of correspondents is not opened. All other correspondents are on the "restricted" list. Mail sent to them is read and inspected. *Inmate Guide*, 17-18 (1972). A correspondent will be excluded from a Wisconsin inmate's "approved regular correspondence list" only if the correspondent would be a "reasonably probable hazard" to security or would be a "materially detrimental factor to rehabilitation." *Wisconsin Manual* at 22, 24.

[35] *Adams Interview* (Alaska); *Pennsylvania Directive* at 2. At this date, the Commissioner of Pennsylvania Corrections anticipates joining in a consent decree which will provide that all outgoing mail will be sealed, unread, and uninspected. Letter from Stewart Werner, Commissioner of the Bureau of Correction to the Center for Criminal Justice, September 6, 1973 [hereinafter cited as *Werner Letter*].

[36] Administrative Procedure No. 115, June 1, 1972. [The definition of "inspection" does not appear.]

[37] *Adams Interview* (Alaska); *Ohio Regulation* 814; *Pennsylvania Directive;* Regulations Governing Mail for All Inmates at the Adult Correctional Institutions (Rhode Island); *Inmate Guide* at 17-19 (South Carolina); Administrative Order Number 838 at 3 (Washington); *Wisconsin Manual* at 23. South Carolina and Wisconsin reserve the right to read mail from parties who do not appear on the approved lists. *See*, note 34, *supra*.

(c) Official Mail

All of the states discussed above have created a special category of mail which typically includes communications with attorneys, courts, state and federal officials, and in some cases, members of the news media. Such outgoing mail is permitted to be sent sealed, uninspected and uncensored. Massachusetts,[38] Ohio, Pennsylvania, Rhode Island, Washington, Wisconsin, and the Federal Bureau of Prisons open and inspect such mail only in the presence of the inmate addressee.[39]

Effects of Current Practices

When the various departments surveyed undertook liberalization of their mail rules, they presumably made the judgment that such reforms would not constitute a serious threat to valid institutional concerns. None of the state corrections departments to which inquiries were directed, for example, claimed to experience any increase in escape attempts that might be attributable to relaxed mail policies. Alaska had no increase in attempts at all. *Adams Interview.* Officials from Ohio and Rhode Island stated that the rate of attempts has risen recently, but Rhode Island found no relationship between this and its mail procedures. Letter from Legal Counsel Edward Burke to the Center for

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[38] This procedure is not provided by a written departmental regulation and in practice is available in only some of the Massachusetts institutions. *Bell Interview.*

[39] *Ohio Regulation* 814; *Pennsylvania Directive;* Regulation Governing Mail for All Inmates at the Adult Correctional Institutions (Rhode Island); Administrative Order Number 838, 2, July 26, 1973 (Washington); telephone interview with John G. Stoddard, Assistant Director of Institutions, Wisconsin Department of Corrections, September 13, 1973 [hereinafter cited as *Stoddard Interview*]; Federal Bureau of Prison Policy Statement, Prisoners' Mail Box 1-2, August 7, 1972.

Criminal Justice, September 13, 1973. Ohio attributed its rise in escape attempts primarily to liberalization of inmate movement both inside and outside the institution. Letter from William Weisenberg to the Center for Criminal Justice, September 10, 1973. Further, none of the states surveyed found that relaxed mail policies resulted in any increase in the incidence of contraband or in the rate of sexual assaults, individual violence, or general disturbances.

Instead of undermining institutional goals, compliance with First Amendment requirements has provided collateral benefits.[40] After liberalizing its mail rules, Washington state correctional authorities discovered a "general decrease in tension," and received letters "from residents and recipients indicating appreciation of the new censorship rule." Letter from Thomas G. Pinnock, Supervisor of Planning, Social Services Division, to the Center for Criminal Justice, September 6, 1973. The Commissioner of Pennsylvania's Bureau of Corrections says that more liberal mail rules have given the resident "considerably more . . . self-respect and reduced discontent and bickering over petty censorship when in reality information censored could have been transmitted verbally on visits." Letter from Commissioner Stewart Werner, September 6, 1973.[41]

Recent Recommendations

Two recent extensive research studies provide further support for the types of liberalized mail regulations which

[40] Wisconsin's reform of mail procedures was principally a Division-initiated process motivated in part by a desire to increase administrative efficiency. *Stoddard Interview.*

[41] A corrections official has suggested that opening up lines of communication between inmates and public may serve as a "catalytic agent in the reform of the criminal justice system." Letter from William K. Weisenberg, Administrative Assistant to

have just been described. In August, 1973, the National Advisory Commission on Criminal Justice Standards and Goals, in its report on a national strategy to reduce crime, recommended that "[c]orrectional authorities should have the right to inspect incoming and outgoing mail for contraband but not to read or censor mail." *A National Strategy to Reduce Crime* at 180.[42]

This is consistent with an earlier study undertaken by the Boston University Center for Criminal Justice which recommended that: (1) all outgoing letters may be sealed and deposited in locked mailboxes; (2) incoming letters may be opened and inspected for contraband but shall not be read; and, (3) mail for attorneys, courts, and state and federal officials may be opened only in the presence of the inmate addressee. Center for Criminal Justice, *Model Rules and Regulations on Prisoners' Rights and Responsibilities*, 46-47 (1973).[43]

The experience of numerous corrections departments and law enforcement officials offers ample support for the District Court finding that the challenged mail rules are vague and overbroad and fail to provide adequate procedural safeguards. It is also apparent that the rules fail to support a compelling state interest and without question do not offer a least restrictive means for regulating a fundamental right. Moreover, less restrictive mail policies are

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the Director of the Ohio Department of Rehabilitation to the Boston University Center for Criminal Justice, September 14, 1973.

[42] Members of the National Advisory Commission on Criminal Justice Standards and Goals were chosen, in part, for their working experience in the criminal justice area. Police chiefs, judges, corrections leaders, and prosecutors were represented.

[43] The Center's recommendations grew out of a thorough study in 1971 of practices employed by corrections departments throughout the United States.

not only feasible but are desirable for improving the correctional system. Thus, the judgment of the District Court should be affirmed or should be modified to preclude, except where required by compelling state interest, all reading of inmate mail.

Conclusion

For the reasons stated above, the judgment below should sustained.

Respectfully submitted,

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